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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 520

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, AMERICAN UNION TRANSPORT, INC., SEATRAIN LINES, INC., THE PENNSYLVANIA RAILROAD COMPANY, ET AL., PETITIONERS

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The order of the district court dismissing the complaints is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a–10a)[1] is reported *sub nom. The Pennsylvania Railroad Co., et al.* v. *C. Douglas Dillon, Secretary of the Treasury, et al.*, 335 F. 2d 292.

[1] The reference "Pet. App." is to the appendix in the petition.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11a–13a) was entered on June 26, 1964. The petition for a writ of certiorari was filed on September 21, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners, as competitors of operators in the domestic coastwise trade, have standing to challenge the action of the Commissioner of Customs in ruling that certain vessels of such operators are entitled to coastwise privileges.

STATUTES INVOLVED

Provisions of Section 27 of the Merchant Marine Act of 1920, 41 Stat. 999, 46 U.S.C. 883, as amended by Public Law 86–583, 74 Stat. 321, and of Section 10(a) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009(a), are set forth in the Appendix, *infra*, pp. 11–12.

STATEMENT

This action was commenced by petitioner Seatrain Lines, Inc., a common carrier by water in the coastwise trade, against the Secretary of the Treasury, the Bureau of Customs, the Commissioner of Customs, and Sea-Land Service, Inc., a competitor of Seatrain, for a declaratory judgment and injunctive relief. The complaint sought to restrain the Commissioner of Customs from enrolling, and Sea-Land from operating, two vessels in the coastwise trade. Seatrain alleged economic injury through increased competition

from such operation.[2] The remaining petitioners are two other common carriers by water and several railroads. Also alleging competition with Sea-Land and economic injury, they sought, and were granted, leave to intervene.[3]

The Commissioner of Customs, head of the Bureau of Customs, which is under the supervision of the Secretary of the Treasury, is "specially charged with the decision of all questions" relating to the documentation of vessels.[4] Documentation takes two forms: that of registry, the purpose of which is to declare the nationality of a vessel engaged in trade with foreign countries and to enable her to assert that nationality wherever she may be; and that of enroll-

[2] Seatrain Lines, Inc., operates between certain Atlantic and Gulf coast ports under a certificate of public convenience and necessity from the Interstate Commerce Commission (J.A. 2–3, 11—this reference is to the Joint Appendix on appeal in the Court below). Implicit in petitioner's allegation that "Sea-Land is a common carrier by water and competes for traffic with Seatrain's service" (J.A. 4) is the fact that Sea-Land's operation, and competition for such traffic, is carried on under a similar certificate.

[3] American Union Transport, Inc., is a common carrier by water operating two vessels between New York (and other Atlantic ports of the United States) and San Juan, Puerto Rico (J.A. 69, 73). American-Hawaiian Steamship Company holds a certificate of public convenience and necessity as a common carrier by water from the Interstate Commerce Commission, has been engaged in the intercoastal trade, and anticipates re-entry into that trade (J.A. 89, 93). The railroads claim competition with Sea-Land's coastwise operations via overland routes (J.A. 79, 83), but they do not claim any independent standing to sue (Pet. 4–5).

[4] Act of July 5, 1884, Section 2, 23 Stat. 118, as amended, 46 U.S.C. 2.

ment, which shows the national character of a vessel engaged in coastwise trade and accords her the privilege of operating in that trade.[5]

Specifically, petitioners challenge the Commissioner's re-enrollment of two vessels which were rebuilt with foreign-built midbodies (allegedly less costly than their American counterparts) in an American shipyard in order to increase their carrying capacity. They claim that such enrollment violated the provisions of Section 27 of the Merchant Marine Act of 1920, 41 Stat. 999, 46 U.S.C. 883, as amended by Public Law 86–583, 74 Stat. 321. (See Appendix, *infra*, p. 11).

As originally enacted, Section 27 provided that no merchandise should be transported by water, or by land and water, between points in the United States embraced within the coastwise laws in any vessel other than a vessel built in and documented under the laws of the United States and owned by persons who were citizens of the United States. 46 U.S.C. 883 (1952 ed.). This section was amended by the Act of July 14, 1956, 70 Stat. 544, to add the proviso that vessels with coastwise privileges which were rebuilt in foreign shipyards could not be re-enrolled. Subsequently, the section was further amended by the Act of July 5, 1960, Public Law 86–583, 74 Stat. 321, to provide that

[5] *Anderson* v. *Pacific Coast S.S. Co.*, 225 U.S. 187, 199. The purpose of the registering and enrolling acts, as found by this Court, was "to encourage our own trade, navigation, and shipbuilding", a broad national purpose designed to build a strong American merchant marine. *Old Dominion Steamship Co.* v. *Virginia*, 198 U.S. 299, 307.

a vessel of more than 500 gross tons which had acquired the right to engage in the coastwise trade and was later rebuilt, should not have the right to engage in such trade thereafter, "unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel," was effected within the United States, its territories or possessions. However, the amendment carried a limited saving clause, as follows:

> SEC. 4. This Act shall be effective from the time of enactment hereof: *Provided, however,* That no vessel shall be deemed to have lost its coastwise privileges as a result of the amendment made by this Act if it is rebuilt within the United States, its Territories (not including trust territories), or its possessions under a contract executed before such date of enactment and if the work of rebuilding is commenced not later than twenty-four months after such date of enactment.

This statute was implemented by Treasury Department regulations.[6]

Contending that the rebuilding had not been performed under bona fide contracts entered into prior to July 5, 1960, petitioners Seatrain and American-Hawaiian protested to the Commissioner. After full consideration,[7] the Commissioner concluded that the

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[6] 19 C.F.R. § 3.2(f), 25 F.R. 13355, as amended, 25 F.R. 13687; and 19 C.F.R. § 3.28, 25 F.R. 13355, as amended, 25 F.R. 13687 (T.D. 55278), and 26 F.R. 2641 (T.D. 55347).

[7] Petitioners availed themselves of the opportunity to present their views in writing and in person, both in conference at the Bureau and thereafter at an informal hearing. There is no statutory or regulatory requirement for a formal hearing.

rebuilding of the vessels was within the saving clause of the 1960 amendment, and that the vessels were entitled to enrollment (J.A. 9–11, 57–60, 94–95; see also Pet. App. 4a, n. 4).

The district court dismissed the ensuing complaints for lack of standing and the court of appeals affirmed. It ruled that the assertion that economic competition was made possible by an allegedly invalid administrative action was insufficient by itself to confer standing to contest the validity of the action; that petitioners were therefore required to show some "statutory aid to standing" in the form of a demonstration of congressional intent to confer on them a legally protected right to be free from such competition; and that petitioners had failed to make such a showing (Pet. App. 6a–7a).

ARGUMENT

This case turns entirely upon its particular facts and presents no question of general importance. The decision, moreover, is clearly correct.

The Administrative Procedure Act does not dispense with the necessity of a showing that petitioners have a legally protected interest to assert. Under Section 10(a) of that Act, 5 U.S.C. 1009(a), they must allege a "legal wrong" or that they have been "adversely affected or aggrieved * * * within the meaning of any relevant statute." Certainly, there is no generalized right to be free of competition. *Alabama Power Co.* v. *Ickes*, 302 U.S. 464; *Tennessee Electric Power Co.* v. *T.V.A.*, 306 U.S. 118. So far as the relevant statute (the Merchant Marine Act

of 1920) is concerned, it makes no provision for judicial review and evinces no congressional purpose to confer enforceable rights on parties in petitioners' position.

The court of appeals correctly concluded, on the basis of its examination of the objectives of the Merchant Marine Act and, more particularly, the legislative history of Section 27 (Pet. App. 7a–9a, n. 5), that the principal aim of the statute was not to protect coastwise carriers such as petitioners from the competition alleged; rather, "the broad congressional purpose underlying these particular enactments was to stimulate and encourage resort to domestic shipyards and thus ensure them sufficient business so that their facilities would be adequate in time of national emergency" (Pet. App. 7a).

The legislative history of the amendments to Section 27 leaves no room for doubt on this score. The opening words of the Senate Report on the bill which became the 1956 amendment (70 Stat. 544), stated that the bill,

> * * * introduced at the request of the shipbuilding and repair interests of the country, was designed to assist the shipyards of the United States by making applicable to vessels rebuilt in foreign yards the historic policy of exclusion from the coastwise trade which has always applied, with certain exceptions, to vessels constructed outside the United States [S. Rep. No. 2395, 84th Cong., 2d Sess., p. 1].

The House Committee considering the same bill pointed out that one of the major purposes of the

historic restrictive policy was "the preservation of an adequate American shipbuilding and ship-repair industry, which is so necessary in time of national emergency." H. Rep. No. 2293, 84th Cong., 2d Sess., p. 2.

When the 1960 amendment (74 Stat. 321) was presented, the same considerations were paramount. The House Committee stated (H. Rep. No. 1887, 86th Cong., 2d Sess., p. 3) that it was "of the opinion that this legislation is needed to close the * * * loophole in the existing statute and to buttress our traditional national objective affecting the coastwise trade and the shipbuilding industry." And the Secretary of Commerce, in recommending favorable consideration, commented:

> One of the major objectives of the Merchant Marine Act of 1936 is to foster and maintain the shipbuilding industry in the United States by placing work in the domestic shipyards so that the yards will be sustained for mobilization and national defense purposes. At the present time shipyards in this country need work very badly and there are recent examples of instances where, had this proposed legislation been the law, additional work might have been generated for American shipyards [*Id.*, p. 7].

This case is quite unlike those in which standing was based on a party's complaint of economic injury resulting from the grant to others of new or extended operating rights by an agency vested with broad power

to regulate the industry in question, such as the Interstate Commerce Commission and the Federal Communications Commission.[8] Enrollment of a vessel with coastwise privileges does not carry with it the right to conduct operations as a common carrier by water in the coastwise trade. That right is conferred by a certificate of public convenience and necessity, issued not by the Commissioner of Customs, who is charged with the documentation of vessels, but by the Interstate Commerce Commission, which also regulates fares, rates and other aspects of the coastwise trade.[9] See Pet. 5–6. This case thus does not involve "the pervasive regulatory scheme which Congress has established for the domestic coastwise carrier industry" (Pet. 5), but, rather, the ancient and purely public business of documenting vessels.

It is one thing to find standing based upon alleged competitive injury where the statutory scheme is one of comprehensive regulation and where Congress has manifested an intention to authorize judicial review at the instance of all who may claim that they are affected by the administrative action in question. It

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[8] See, *e.g.*, *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1; *Scripps-Howard Radio* v. *Commission*, 316 U.S. 4; *F.C.C.* v. *Sanders Radio Station*, 309 U.S. 470. Moreover, in each of these cases, cited by petitioners at Pet. 12, 16, 17, the "relevant statute" contained express provision for judicial review.

[9] 49 U.S.C. 901-923. Carriage between United States ports and Puerto Rico in which American Union Transport competes with Sea-Land, is excluded from the jurisdiction of the I.C.C. (49 U.S.C. 902(i)), and is regulated by the Maritime Commission under 46 U.S.C. 801–842.

is another to do so where Congress has made no provision for court review and the claims of those who assert adverse effect are far removed from the purposes for which the statute was enacted. In the instant case, which falls within the latter class and incidentally involves a quite speculative claim of injury, there is no basis for constituting these petitioners, in Judge Frank's phrase, "private Attorneys General."[10]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
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NOVEMBER 1964.

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[10] Both of the prior cases in the District of Columbia Circuit which petitioners assert to be in conflict with the decision here are clearly distinguishable, as set forth in the opinion below (Pet. App. 8a–10a; 10a, n. 6).

APPENDIX

1. Section 27 of the Merchant Marine Act, 1920, 41 Stat. 999, 46 U.S.C. 883, as amended by the Act July 14, 1956, 70 Stat. 544, and the Act of July 5, 19[illegible] Public Law 86-583, 74 Stat. 321, provides:

> No merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by section 13 or 808 of this Act: * * * *Provided further,* That no vessel of more than five hundred gross tons which has acquired the lawful right to engage in the coastwise trade, by virtue of having been built in or documented under the laws of the United States, and which has later been rebuilt, shall have the right thereafter to engage in the coastwise trade, unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel, is effected within the United States, its Territories (not including trust territories), or its possessions: * * *

2. Section 4 of Public Law 86-583, 74 Stat. 321, provided:

> SEC. 4. This A[illegible]all be effective from the time of enactme[illegible]ereof: *Provided, however,* That no vessel shall be deemed to have lost its

coastwise privileges as a result of the amendments made by this Act if it is rebuilt within the United States, its Territories (not including trust territories), or its possessions under a contract executed before such date of enactment and if the work of rebuilding is commenced not later than twenty-four months after such date of enactment.

3. Section 10(a) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009(a) provides:

> (a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.